Ahmad Nadzrin bin Abd Halim & Anor v Allianz General Insurance Co (M) Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(A)-1390–08 OF 2014
LIM YEE LAN, HAMID SULTAN AND PRASAD ABRAHAM JJCA
27 AUGUST 2015

Insurance — Motor Insurance — Liability — Insurer applied for declaration it was not liable to satisfy any judgment obtained against insured in personal-injury damages suit brought by third party — Insurer's application filed on discovering insured had sold insured vehicle before date of accident — High Court granted declaration despite objection by plaintiffs in negligence suit that insurer should have filed application before date of accident — Whether High Court's decision correct — Whether phrase 'if before the date the liability was incurred' in s 96(3) of the Road Transport Act 1987 meant insurer could file application before judgment was made against insured in negligence suit — Whether phrase could not mean application should be filed before date of accident because insurer's liability only arose when judgment against insured was made

The appellants had filed a personal injury damages claim in the sessions court against the driver and owner of a car insured by the respondent which collided with a motorcycle the appellants were riding. Initially, the respondent defended the suit on their insured's behalf but when it discovered that their insured, without informing them, had sold the car to another person before the date of the accident (and the ownership change was not registered with the Road Transport Department), it ceased to defend the suit and applied to the High Court for a declaration that it was not liable to pay under the insurance policy because the insured had failed to notify it that he had sold the car. The appellants intervened in the application and contended that because it was filed after the date of the accident, the application should be dismissed. Section 96(3) of the Road Transport Act 1987 ('the RTA') allowed an insurer to avoid liability to pay if before the date the liability was incurred it had obtained a declaration from court that the insurance was void or unenforceable. The appellants argued that the said italicised phrase meant the respondent's application should have been filed before the date of the accident and not, as was held in some decisions of the High Court, before judgment in the negligence suit was obtained. The High Court dismissed the appellants' objection and granted the declaration sought by the respondent, holding that it was bound to follow a decision of the Court of Appeal (for which no written grounds of judgment were available) on the point. In that 2013 decision, the Court of Appeal had upheld a decision of the High Court in *Kurnia Insurans (Malaysia) Bhd v Kein Hing Applicances Sdn Bhd* (Shah Alam High Court OS

24-2979-12/2011) where a similar application by the insurer there under s 96(3) of the RTA, and made before judgment was entered, was allowed. The instant appeal against the High Court's decision turned on the construction of the phrase 'before the date the liability was incurred' occurring in s 96(3) of the RTA.

Held, dismissing the appeal and with no order as to costs:

(1) Under s 96(3) of the RTA, an insurer could commence an action to repudiate a policy issued in respect of an insured vehicle before any judgment was obtained in the proceeding commenced by a third party for damages for bodily injuries or death sustained in a road accident caused by or arising from the use of the insured vehicle (see para 39).

(2) Sections 96(2)(a), (b) and (c) and s 96(3) of the RTA were the only circumstances and conditions under which an insurer could avoid its payment obligation to a third party in respect of any judgment obtained against the insured owner under s 96(1). The circumstance mentioned in s 96(2)(c) was different from that specified in s 96(3). The circumstance in s 96(2)(c) was 'if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability' (ie before the happening of the accident) the policy had been called by mutual consent between the insured and the insurer accompanied by the surrender of the certificate of insurance. Whereas under s 96(3) the words used were 'before the date the liability was incurred'. The choice of words was intentional and was meant to cover two different circumstances under which an insurer could repudiate its liability under a policy (see paras 21–24).

(3) Section 96(3) was intended to cover a situation in which the accident, which was the cause of the death or bodily injury giving rise to the liability covered by the terms of the policy, had already occurred but before any judgment had been pronounced by the court in the proceeding commenced by the third party to claim damages against the driver and insured owner in respect of such bodily injuries and/or death (see para 25).

(4) The line of decisions which interpreted the words 'before the date the liability was incurred' in s 96(3) to mean a date before the accident were in error as they failed to look at s 96 as a whole and to realise that the circumstance under which a policy could be cancelled before the accident was already covered under s 96(2)(c) of the RTA (see para 26).

(5) The High Court in this case was right in dismissing the objection of the appellants that the respondent's application for a declaration under s

96(3) was out of time as the appellants' suit in the sessions court was yet to be completed and judgment was yet to be pronounced by that court (see para 28).

(6) The respondent could obtain the declaration before the judgment in the negligence suit. The Court could refuse the declaration if the appellants could demonstrate prejudice in consequence of the respondent's delay in approaching the court for relief, taking into consideration that the relevant provision had the characteristic of social legislation. The affidavit of the appellants, however, did not demonstrate any fact relevant to the question of prejudice or that it would be unjust to grant the declaration. The appellants had only complained of delay and not that their claim had been prejudiced by delay which could not be compensated for by costs by the insurer (see para 52).

(7) The words 'if before the date the liability was incurred' in s 96(3) must mean the respondent was entitled to obtain a declaration from court that its policy was void and/or unenforceable before judgment was entered against the insured which was when liability would be incurred by the respondent. The liability of the insured only arose when judgment was obtained against him. How could it be said that liability arose immediately upon issuance of a policy when the purpose of the same was to cover a third party claim against the insured when and only when judgment was entered against the insured. The obtaining of the judgment was a condition precedent to liability (see paras 68 & 71).

[Bahasa Malaysia summary

Perayu telah memfailkan tuntutan ganti rugi kecederaan peribadi di mahkamah sesyen terhadap pemandu dan pemilik kereta diinsuranskan oleh responden yang mana bertembung dengan motorsikal yang dtunggang oleh perayu. Pada mulanya, responden membela guaman yang diinsuranskan oleh pihak mereka tretapi apabila ia mendapati bahawa mereka berinsurans, tanpa memaklumkan mereka, telah menjual kereta kepada orang lain sebelum tarikh kemalangan (dan pertukaran pemilik tidak didaftarkan Jabatan Pengangkutan Jalan), ia berhenti membela guaman dan memohon kepada Mahkamah Tinggi untuk deklarasi bahwa ia tidak bertanggungan untuk membayar di bawah polisi insurans kerana pengambil insurans gagal untuk memaklumkannya bahawa ia telah menjual kereta. Perayu campur tangan dalam permohonan dan menghujahkan bahawa oleh kerana ia telah difailkan selepas tarikh kemalangan, permohonan sepatutnya ditolak. Seksyen 96(3) Akta Pengangkutan Jalan 1987 (APJ) membenarkan syarikat insurans untuk mengelak tanggungan untuk membayar jika sebelum tarikh tanggungan berlaku ia telah memperolehi satu deklarasi daripada mahkamah bahawa insurans adalah terbatal dan tidak boleh dilaksanakan. Perayu berhujah bahawa frasa yang huruf dicondongkan bermaksud permohonan responden sepatutnya memfailkan sebelum tarikh kemalangan dan bukan, seperti yang

diputuskan dalam beberapa keputusan Mahkamah Tinggi, sebelum penghakiman dalam guaman kecuaian diperolehi. Mahkamah Tinggi menolak bantahan perayu dan memberikan deklarasi dipohon oleh responden, memutuskan bahawa ia terikat untuk mengikut keputusan Mahkamah Rayuan (untuk yang mana alasan penghakiman bertulis boleh didapati) pada perkara itu. Dalam keputusan tahun 2013 itu, Mahkamah Rayuan telah menegakkan satu keputusan Mahkamah Tinggi dalam kes *Kurnia Insurans Malaysia Bhd v Kein Hing Appliances Sdn Bhd* (Shah Alam High Court OS 24-2979-12/2011) di mana permohonan yang sama oleh syarikat insurans di bawah s 96(3) APJ, dan dibuat sebelum penghakiman dimasukkan, telah dibenarkan. Rayuan ini terhadap keputusan Mahkamah Tinggi mengaktifkan pembinaan frasa 'before the date the liability was incurred' di dalam s 96(3) APJ.

Diputuskan, menolak rayuan dan tanpa perintah dengan kos:

(1) Di bawah s 96(3) APJ, satu syarikat insurans boleh memulakan satu tindakan untuk membatalkan satu polisi yang dikeluarkan berkaitan dengan sebuah kenderaan yang diinsuranskan sebelum apa-apa penghakiman diperolehi dalam prosiding yang dimulakan oleh pihak ketiga untuk ganti rugi untuk kecederaan badan atau kematian yangs dialami dalam kemalangan jalan raya disebabkan oleh atau terjadi daripada penggunaan kenderaan yang diinsuranskan (lihat perenggan 39).

(2) Seksyen 96(2)(a),(b) dan (c) dan s 96(3) APJ satu-satunya keadaan dan syarat yang mana syarikat insurans boleh mengelak pembayaran obligasinya kepada pihak ketiga berkaitan apa-apa penghakiman didapati terhadap orang yang diinsuranskan di bawah s 96(1). Keadaan yang disebut dalam s 96(2)(c) adalah berbeza daripada apa yang dinyatakan dalam s 96(3). Keadaan dalam 96(2)(c) adalah '*if beore happening of the event which was the cause of the death or bodily injury giving rise to the liability*' (iaitu sebelum berlaku kemalangan) polisi itu telah dibuat melalui kebenaran bersama antara orang yang diinsuranskan dan syarikat insurans diikuti dengan penyerahan sijil insurans. Sedangkan di bawah s 96(3) perkataan yang digunakan adalah '*before the date the liability incurred*'. Pemilihan perkataan adalah disengajakan dan bermaksud untuk melindungi dua keadaan berbeza yang mana syarikat insurans boleh membatalkan liabilitinya di bawah polisi (lhat perenggan 21–24).

(3) Seksyen 96(3) adalah bertujuan untuk mlindungi satu situasi di mana kemalangan, yang menyebabkan kematian atau kecederaan tubuh badan yang membangkitkan kepada tanggungan yang terangkum oleh terma polisi, telah pun berlaku tetapi sebelum apa-apa penghakiman telah disebut oleh mahkamah dalam prosiding oleh pihak ketiga untuk

menuntut ganti rugi terhadap pemandu dan pemilik yang diinsuranskan berkaitan kecederaan tubuh badan dan/atau kematian sebegitu (lihat perenggan 25).

(4) Baris keputusan yang mentafsirkan perkataan 'before the date the liability was incurred' dalam s 96(3) untuk bermaksud tarikh sebelum kemalangan adalah salah kerana mereka gagal untuk melihat s 96 secara keseluruhan dan untuk menyedari bahawa keadaan yang mana di bawah polisi boleh dibatalkan sebelum kemalangan telah pun termasuk di bawah s 96(2)(c) APJ (lihat perenggan 26).

(5) Mahkamah Tinggi dalam kes ini adalah betul dalam menolak bantahan perayu bahawa permohonan responden untik deklarasi di bawah s 96(3) adalah di luar masa kerana guaman perayu dalam mahkamah sesyen belum lagi selesai dan penghakiman belum diberikan oleh mahkamah itu (lihat perenggan 28).

(6) Responden boleh mendapatkan deklarasi sebelum penghakiman dalam guaman kecuaian. Mahkamah boleh menolak deklarasi jika perayu boleh mendemonstrasikan prejudis akibat daripada kelewatan responden dalam meminta mahkamah untuk relief, mengambil kira bahawa proviso berkaitan mempunyai ciri undang-undang sosial. Afidavit perayu, walau bagaimanapun, tidak menunjukkan apa-apa fakta berkaitan kepada persoalan prejudis atau bahawa ia akan menjadi tidak adil untuk memberikan deklarasi. Perayu hanya mengadukan kelewatan dan bukan tuntutan mereka telah diprejudiskan kerana kelewatan yang tidak boleh dipampas dengan kos oleh syarikat insurans (lihat perenggan 52).

(7) Perkataan 'if before the date the liability was incurred' dalam s 96(3) mestilah bermaksud responden berhak mendapatkan deklarasi daripada mahkamah bahawa polisinya adalah batal dan/atau tidak boleh dilaksanakan sebelum penghakiman dimasukkan terhadap orang yang diinsuranskan yang mana apabila tanggungan akan ditanggung oleh responden. Tanggungan orang yang diinsuranskan hanya timbul apabila penghakiman diperoehi terhadapnya. Bagaimana boleh dikatakan bahawa tanggungan timbul serta-merta apabila pengeluaran polisi apabila tujuan yang sama adalah untuk melindungi tuntutan pihak ketiga terhadap orang yang diinsuranskan apabila dan hanya bila penghakiman dimasukkan terhadap orang yang diinsuranskan. Pemerolehan penghakiman adalah syarat duluan kepada tanggungan (lihat perenggan 68 & 71).]

Notes

For cases on liability, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 425–431.

Cases referred to

Kurnia Insurans (Malaysia) Bhd v Kein Hing Appliances Sdn Bhd (Shah Alam High Court OS 24-2979-12/2011), HC (refd)

Pacific & Orient Insurance Co Bhd v Kamacheh a/p Karuppen [2015] 4 MLJ 218; [2015] 4 CLJ 54, CA (refd)

Pacific & Orient Insurance Co Berhad v Goh Cheng Loong & 2 ors [2013] 1 LNS 1002, HC (refd)

QBE Insurance Ltd v Hashim bin Abdul & Anor [1981] 2 MLJ 275 (refd)

Legislation referred to

Road Transport Act 1987 ss 2, 80(1), 88, 89, 90, 91, 91(a), (b), 91(1)(b), (4), 92, 93, 94, 95, 96, 96(1), (2), (2)(a), (b), (c), 96(3), 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

Ramani Krishnan (Raj & Co) for the appellants.

S Kanagasabapathi (R Davina with him) (Kanaga, Suresh & Co) for the respondent.

Lim Yee Lan JCA:

INTRODUCTION

[1] The appellants/interveners' appeal is against the decision of the Kuala Lumpur High Court made on 7 August 2014 in which the learned judicial commissioner ('JC') had allowed a declaration sought by the respondent ('the insurer') vide an originating summons ('OS') pursuant to s 96(3) of the RTA that the policy No 12 MVL074908, effective from the period November 2012 to November 2013, issued in respect of a motor vehicle bearing registration No WHH 4039 ('insured vehicle') registered in the name of one Imtinan Muhammad Sultan ('the insured') was void and unenforceable in so far as the road accident which occurred on 22 January 2013 which involved motorcycle No WUT 8370 and the insured vehicle and that the respondent was not liable for any order relating to the plaintiff's suit.

BRIEF FACTS

[2] The interveners were the plaintiffs in suit No A53KJ-379–12 of 2013 filed at the Bangi Sessions Court in which the plaintiffs, rider and pillion rider of motorcycle WUT 8370, claimed damages for injuries sustained in a road accident involving the said motorcycle and the insured vehicle. The suit was against one Danial as the driver of the insured vehicle and Imtinan Muhamad Sultan as the registered owner of the insured vehicle ('the defendants').

[3] Initially, the respondent had directed a solicitor to defend the defendants in the suit. During the course of the trial, the respondent discovered that the

A insured vehicle had been sold to another person by the name of Abdul Razak bin Yaacop ('new owner') and the driver ('Danial') was his son. The facts showed that although the sale of the insured vehicle took place before the date of the accident, the change in ownership was never registered with the Road Transport Department due to some spelling mistake in the name of the insured B as it appears in his passport and in the record of the RTD and he remained the registered owner of the car. The new owner had been renewing the policy in the name of the insured, Imtinan Muhamad Sultan.

C **[4]** The respondent then discharged the solicitor and filed the present OS to declare the policy void and unenforceable in so far as the road accident which occurred on 22 January 2013 and that the respondent was not liable for any order relating to the plaintiff's suit.

D **[5]** The respondent's application was premised on the ground that failure of the insured (second defendant in the Bangi suit) to disclose the sale of the car to the new owner (Danial's father) was a non disclosure of a material fact which entitled it to avoid the policy issued to the insured.

E **[6]** The plaintiffs applied to intervene in the OS and were allowed by the court.

[7] The plaintiffs/interveners opposed the OS on the ground that the F respondent's application to cancel the policy under s 96(3) was out of time. It was argued that the phrase *'the date the liability was incurred'* in s 96(3) must be interpreted as requiring an application under that subsection to be made before the date of accident. It cannot be applied after the accident.

G **[8]** Since the application in this case was made after the accident, it could not be maintained and must be dismissed.

[9] After hearing the parties, the learned JC dismissed the plaintiffs/interveners' objection and granted the declaration sought by the H respondent.

[10] In her judgment, the learned JC gave the following reasons for her decision:

I 15 The issue for determination here is the meaning to be given to the phrase *'the date the liability* was incurred' in s 96(3):

...

16 The above phrase has been the subject of judicial consideration in a number of cases. It appears that there are two lines of decisions on the construction to be given

to this phrase. One adopting the position that the declaration must be obtained by the insurance company before the accident involving the insured vehicle, and the other taking the position that it must be obtained before judgment.

17 In *Kurnia Insurans (Malaysia) Bhd v Kein Hing Appliances Sdn Bhd* (Shah Alam High Court OS 24–2979–12 of 2011, the High Court adopted the latter view and granted an application under s 96(3), notwithstanding the fact that it was made after the accident. The court rejected the contention that s 91(a)(b) demonstrated that the view that the application can be made at any time before judgment was erroneous. Hadhariah bt Syed Ismail J explained:

> Di bawah s 96(3) Akta Pengangkutan Jalan 1987, penanggung insurans boleh memohon deklarasi membatalkan polisi sebelum 'liability was incurred'. Peguam cara responded kedua berhujah bahawa perkataan 'before the date the liability was incurred' bermaksud pada masa kemalangan dan bukannya sebelum penghakiman diberikan. Saya dimaklumkan oleh peguam cara pemohon bahawa pemohon berada dalam keadaan 'catch 22' kerana jika deklarasi tidak dipohon sebelum penghakiman diberikan, mereka akan kehilangan hak untuk membatalkan polisi insuran itu kemudiannya. Saya berpendapat perkataan 'before the date the liability was incurred' itu bermaksud sebelum penghakiman diberikan. Pendapat saya itu berasaskan fakta bahawa tidak siapa yang tahu bila kemalangan akan berlaku. Adalah mustahil untuk menanggung insurans boleh mengesahkan polisi insurans sah pada hari kemalangan berlaku kerana siasatan perlu dibuat terlebih dahulu.

18 The decision was affirmed by the Court of Appeal on 1 August 2013. It is imperative to note that the interveners repeat before me the same arguments that were unsuccessfully advanced in the Court of Appeal. The decision of the Court of Appeal constitutes a precedent by which this court is bound and concluded the issue here in favour of the plaintiffs. In the result, the application is not out of time and the plaintiffs are entitled to the declaration they seek as the Bangi action is still pending.

[11] Dissatisfied with the decision of the High Court the interveners/plaintiffs appealed to this court, hence this appeal before us.

[12] To our minds, the issue raised in this appeal boils down to this:

> When in point of time can an insurance company commence an action under s 96(3) of the RTA to declare a policy issued to an insured in respect of an insured vehicle void or unenforceable?

[13] This question turns on the meanings to be given to the phrase 'before the date the liability was incurred' found in s 96(3).

[14] As the issue involves an interpretation of a specific provision in a statute, in this case sub-s 96(3) of the RTA ('the Act') it is imperative for the court, when considering the meaning of certain words used in that section, to look at

A the whole of the section in order to discover the legislative intent behind that section in general and the sub-section in particular.

[15] Now s 96 falls under Part IV of the Act in which the heading reads 'PROVISIONS AGAINST THIRD PARTY RISKS ARISING OUT OF
B THE USE OF MOTOR VEHICLE'. A reading of the preamble to the Act shows that Part IV was enacted to fulfill the object of the Act which is, inter alia, 'to make provision for the protection of third parties against risks arising out of the use of motor vehicles'.

C

[16] A perusal of the various ss 88–107 in Part IV would indicate that they proscribe a compulsory third party insurance scheme which is designed to protect third party road users who may suffer bodily injury or death caused by or as a result of the use of an insured vehicle on the road. To achieve that
D objective, inter alia, these provisions require the registered owner of a vehicle to take out a policy in respect of the vehicle against third party risks (s 90) only with an authorised insurer defined in the Act (s 91) and imposes an obligation on the insurer to honour a policy against third party risks issued in respect of the insured driver and insured vehicle, notwithstanding any right it may have
E against the insured to repudiate any liability covered under the policy (s 96(1)).

[17] In the light of the compulsory third party insurance scheme as proscribed in Part IV of the RTA, it can be concluded that while the obligation of an insurer to indemnify an insured against any third party claim in any
F negligence suit involving the insured vehicle is a contractual obligation based on the terms of the policy issued, an insurer's obligation to satisfy a judgment sum obtained by a third party for bodily injuries or death caused by or arising from the use of an insured vehicle is founded on statute.

G **[18]** That this is the position of the law is succinctly explained by this court in its latest decision in the case of *Pacific & Orient Insurance Co Bhd v Kamacheh a/p Karuppen* [2015] 4 MLJ 218; [2015] 4 CLJ 54.

H **[19]** In that case, the central issue for determination in the appeal was whether the insurer (appellant in that case) ought to be held liable to pay to the third party (respondent) whose injuries had been caused by the criminal use of the vehicle by the insured. Simply put, whether the use of the insured vehicle would cover the use of the same in a criminal act.

I

[20] In answering the question in the affirmative, this court sets out the law governing the nature of the obligation of an insurer to a third party under s 96(1) of the Act in the following manner:

(1) The right of the respondent as a third party to approach the court for redress

against the appellant, who itself was not a tortfeasor and with whom the respondent had no contractual relationship, arose from statutory empowerment under s 96 of the RTA. The mechanism of s 96 of the RTA operates thus: there is a statutory obligation created by s 96 of the RTA on the part of the insurer on being so notified on the failure of the insured to pay up the judgment sum that the insured had failed to be satisfied in favour of the third party. This duty to pay up is statutory in origin and is an exception to the concept founded upon privity of contract. (para 17)

...

(4) Section 96(1) imposes upon the insurer the obligation of paying to the person who had obtained judgment against the insured, after a certificate of insurance had been duly delivered to the person by whom the policy is effected in respect of any third part risk covered under the policy. The appellant in the present appeal was obliged statutorily to pay the respondent who had obtained the judgment against the insured and therefore, it was the insurer's mandatory duty to satisfy the judgment. (para 38);

(5) The appellant would be able to avoid the payment obligation under the circumstances and conditions mentioned in sub-ss (2) and (3) of s 96 of the RTA ie, where the requisite notice of the proceedings was not given to the insurer before the commencement of the proceedings; where there is a stay of the judgment pending appeal; where the policy of insurance respecting the liability had been cancelled; and where the insurer had obtained a declaration from the court that the insurance was void and unenforceable. However, none of the conditions were fulfilled by the appellant to exonerate its statutory obligation under the policy (paras 39 & 40);

(6) Sections 94 and 95 of the RTA prohibited an insurer from relying on certain terms in an insurance policy for the purposes of excluding liability. Section 95(k) of the RTA specifically stated that an insurer cannot rely on any conditions which purports to restrict the insurance of the persons insured by reference to the matters set out therein, inter alia, that the motor vehicle was being used for a purpose other than the purpose stated in the policy. Hence, the insurer could not impose such terms and conditions on their insurance policy that would be contrary to RTA as was done in the General Exception 3(a) of the policy.

[21] Based on the decision of this court in *Pacific & Orient Insurance Co Bhd v Kamacheh Karuppen*, it is now clear that the following are the only circumstances and conditions under which an insurer would be able to avoid its payment obligation to the third party in respect of any judgment obtained against an insured owner under s 96(1), namely:

(a) before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer was not given any notice of the proceedings (s 96(2)(a);

(b) where the execution of the judgment is stayed pending an appeal (s 96(2)(b);

A (c) before the happening of the event which was the cause of the death or bodily injury giving rise to the liability covered under the policy, the policy has been cancelled by mutual consent between the insured and the insurer or by virtue of any provision contained therein and the certificate of insurance surrendered to the insurer pursuant to such cancellation (s 96(2)(c)); and

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(d) before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable (s 96(3)).

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[22] One would notice at once from the above narration that the circumstance mentioned in s 96(2)(c) is different from the circumstance specified in s 96(3), viz, while s 96(2)(c) uses the words if before the happening of the event which was the cause of the death or bodily injury giving rise to the D liability, s 96(3) uses the words 'before the date the liability was incurred'.

[23] In our view, the choice of words was intentional and was meant to cover two different circumstances under which an insurer can repudiate its liability E under a policy.

[24] Section 96(2), in our view, is meant to cover a situation where before the happening of the accident which was the cause of the death or bodily injury giving rise to the liability, the policy has been cancelled by mutual consent F between the insured and the insurer accompanied by the surrender of the certificate of insurance, because the words 'the event which was the cause of the death' in simple layman terms can only mean 'the accident which was the cause of the death'.

G **[25]** Section 96(3), on the other hand, is intended to cover a situation in which the accident which was the cause of the death or bodily injury giving rise to the liability covered by the terms of policy has already occurred but before any judgment is pronounced by the court in the proceeding commenced by the third party to claim damages against the driver and insured owner in respect of H such bodily injuries and or death.

[26] Hence, the first line of decisions went into error when, without looking at s 96 as a whole, they had interpreted the words 'before the date the liability was incurred' in s 96(3) to mean a date before the accident, without realising I that the circumstance under which a policy can be cancelled before the accident is already covered under s 96(2)(c).

[27] In this regard, we agree with and cite with approval the following passage of the judgment in the case of *Pacific & Orient Insurance Co Berhad v*

Goh Cheng Long & Ors, in which Vazeer Alam Mydin Meera JC (as he then was) sets out correctly the proper interpretation to be given to s 96(3) in the following manner:

> [16] A careful reading of s 96(3) of the Road Transport Act 1987 shows that the insurer can repudiate liability only if, before liability was incurred, the insurer has obtained a declaration from the court to the effect that the policy of insurance is void or unenforceable. Here, the statutory liability for the plaintiff to pay would arise from the operation of Section 96(1) of the Road Transport Act 1987 which reads:
>
> > If, after a certificate of insurance has been delivered under sub-s 91(4) to the person by whom a policy has been affected, judgment in respect of any sub liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> [17] Therefore, it is abundantly clear that the insurer's statutory liability to pay would come about when judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy and the requisite notice under s 96(2) of the Road Transport Act 1987 has been given by the claimant, provided that the other provisos in s 96(2) did not apply. Once that liability has arisen the insurer cannot avail itself of the provisions of s 96(3) of the Road Transport Act 1987 to seek declaratory relief to repudiate liability. In this case, that judgment on liability pursuant to s 96(3) would be the judgment of the sessions court in the sessions suit, which has been delivered.

[28] Based on the foregoing discussion and findings, we are of the view that the learned JC was right when she, in reliance on the case of *Kurnia Insurans (Malaysia) Bhd v Kein Hing Appliances Sdn Bhd* (which had since been affirmed by this court although no written judgment has been issued), dismissed the objection of the plaintiffs/interveners that the respondent's application for a declaration under s 96(3) was out of time on the ground that while a suit had been commenced by the plaintiffs/interveners against the defendants in the Bangi Sessions Court, the case has not been completed and no judgment has been pronounced as yet by the Bangi Sessions Court.

[29] Be that as it may, we noticed that the one pertinent question which so far escapes the attention of the courts dealing with s 96 of the Act is, what would happen to a third party where a policy has been cancelled or repudiated pursuant to the circumstances provided in s 96(2) and s 96(3) of the Act? Would he be left with a paper or empty judgment in the event the driver or

registered owner of the vehicle cannot satisfy the judgment sum?

[30] In view of the legislative intent behind Part IV of the Act, which is to provide a compulsory insurance scheme for the protection of a third party against risk arising out of the use of a motor vehicle on the road, the Act ensures that there are adequate provisions to cover these eventualities.

[31] These provisions are found in s 91(a) of the Act. As stated earlier, s 91 provides that a policy is only effective if it is obtained from an authorised insurer. An 'authorised insurer' is in turn defined in s 2 of the Act as 'a person lawfully carrying on motor vehicle insurance business in Malaysia who is a member of the Motor Insurers' Bureau'.

[32] The term *Motor Insurers' Bureau* is in turn defined in s 2 of the Act as 'the Motor Insurers' Bureau which has executed an agreement with the Minister of Transport to secure compensation to third party victims of road accidents in cases where such victims are denied compensation by the absence of insurance or of effective insurance'.

[33] Reading s 91 together with the definition of 'authorised insurer', it would necessarily mean that every insurance company carrying on a motor insurance business in Malaysia is a member of the Motor Insurers' Bureau.

[34] In this regard, the latest memorandum of agreement signed between the Motor Insurers' Bureau and the Minister of Transport is the memorandum of agreement dated 1 January 1992 ('MOT—MOA'). Pursuant to the MOT—MOA, the Motor Insurers' Bureau ('Bureau') had in turn entered into a Memorandum of Agreement (Insurers—MOA) of even date between the Bureau and all the insurers of motor vehicle insurance which binds each of the insurers to the Bureau and severally to each and every other of the insurers to perform the MOT—MOA.

[35] Under the Insurers—MOA, every insurance company in Malaysia has agreed in principal to provide insurance coverage in the following situations:

(a) in the event the insurance is obtained fraudulently, or through misrepresentation, non-disclosure of material fact or mistake (cl 1(ii));

(b) in the event the vehicle is under the control of an 'unauthorised driver' (cl 1(iv)); and

(c) in the event the ownership and or interest in a vehicle had changed hands (cl 1 (vi)).

[36] Clause 2 of the MOT—MOA provides that the Bureau will consider to

make at its absolute discretion, compassionate payments or allowances to persons injured and to the dependents of persons killed in the accident through the use of motor vehicles which do not have in force any policy of insurance as required by Part IV of the RTA or where such a policy is ineffective for any reason other than the inability of the insurer to make payment.

[37] Clause 4 of the MOT—MOA allows the Bureau or the insurer (who has paid on behalf of the Bureau) to recover any sum paid under cl 2 of the MOT—MOA against the policy holder or any other person.

[38] Based on the foregoing provisions in s 91, it is clear that a third party who obtains judgment against an uninsured driver and or registered owner of a vehicle by virtue of its cancellation or repudiation by the insurer can look to the Bureau for satisfaction of the judgment sum, although as we understood it, not to the full extent but in practice up to 75% of the judgment sum.

CONCLUSION AND DECISION

[39] Based on the foregoing discussions and findings, our answer to the question raised in this appeal is that under s 96(3) of the Act, an insurer can commence an action to repudiate a policy issued in respect of an insured vehicle before any judgment is obtained in the proceeding commenced by a third party for damages for bodily injuries or death sustained in a road accident caused by or arising from the use of the insured vehicle.

[40] For the foregoing reasons, we dismiss the appeal with no order as to costs and affirm the decision of the High Court.

Hamid Sultan JCA:

[41] The appellants/interveners appeal against the decision of the learned High Court judge in relation to a declaration by the respondent insurer of the motor vehicle No WUT 8370 against the insured, Imtinan Muhammad Sultan, the respondent in the originating summon. Despite the intervener's objection to the declaration, the learned High Court judge had allowed the respondents prayer for a declaration which reads as follows:

> 1. Masa (jika perlu) dilanjutkan untuk memfailkan Saman Pemula ini;
>
> 2. Polisi No. 12MVL074908 yang melindungi motorkar No. WHH 4039 bagi tempoh dari 6.11.2012 hingga 5.11.2013 adalah tak sah (void) dan tidak boleh dikuatkuasakan (unenforceable) setakat perlindungan terhadap satu kemalangan jalanraya yang berlaku pada 22/1/2013 yang melibatkan motorsikal No. WUT 8370 dan motorkar No. WHH 4039;

A 3. Selanjutnya, Pemohon tidak bertanggungjawab untuk menanggung sebarang perintah berikutan dengan tindakan Sivil di Mahkamah Sesyen Bandar Baru Bangi Dalam Selangor Darul Ehsan, Malaysia Saman No. A53KJ-379-12/2013;

B ...

[42] The interveners are the plaintiffs in a suit No 24NCVC-774–05 of 2014, claiming damages for negligence against vehicle owner Imtinan Mohammad Sultan. The insurer had directed the solicitor to defend the suit C and the action has been tried but no judgment has been delivered. During the course of trial, the insurer had discovered that the vehicle had been sold to another person at the time of the accident. To avoid liability, the insurer who is the respondent in this appeal had filed for declaration and was successful.

D **[43]** Upon hearing the submission, we reserved judgment. My learned sister Lim Yee Lan JCA and learned brother Prasad Sandosham Abraham JCA have written separate judgments. This is my judgment.

PRELIMINARIES

E

[44] The learned trial judge had set out the facts as well as the law in a lucid manner. In concluding the judgment, the learned High Court judge had relied on the judgment of the High Court in the case of *Kurnia Insurans (Malaysia) Bhd v Kein Hing Appliances Sdn Bhd* (Shah Alam High Court OS F 24–2979–12/2011), which is said to have been affirmed by the Court of Appeal but no written grounds are available. Both learned counsel agree there are conflicting decisions of the High Court in relation to the construction of s 96(3) of the Road Transport Act 1987 ('RTA 1987') and there is no written decision of the Court of Appeal on this issue.

G

[45] In the instant case, it is not in dispute that insurers can seek a declaration to avoid a policy and/or certificate of insurance issued for a motor vehicle under RTA 1987. The issue is when that application should be made, taking into consideration the insurance policy is mandatory to cover third party liability H and in that respect, some of the provisions in RTA 1987 can be categorised as a social legislation to protect road users from the negligence caused by the usage of motor vehicle owned by the assured. The learned High Court judge had captured this part of the argument in the judgment and it reads as follows:

I 12 The interveners, on the other hand, did not dispute that the plaintiffs were entitled in law to avoid the policy on account of the defendant's omission to disclose the sale, but contended that the application for the cancellation of the policy under s 96(3) was out of time. It was argued that the phrase 'the date the liability was incurred' in s 96(3) must be interpreted as requiring any application under this provision must be made before the date of accident. It cannot be applied for after the

accident. It was argued that this construction was supported by the wording used in s 91(1)(b) which states:

> In order to comply with the requirements of this Part, a policy of insurance must be a policy which—
>
> (a) is issued by a person who is an authorized insurer within the meaning of this Part; and
>
> (b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn on a road.

13 The interveners argued that as the plaintiffs have made the application after the accident, it cannot be maintained and must be dismissed.

14 Section 96(1) of the 1987 Act imposes a duty on insurance companies to satisfy judgments against persons insured in respect of third parties. It is common ground that under s 96(1), the plaintiffs will be bound to satisfy any judgment obtained against the defendant in the Bangi action unless the plaintiff obtains a declaration as set out in s 96(3).

15 The issue for determination here is the meaning to be given to the phrase 'the date the liability was incurred' in s 96(3). For ease of reference, I set out s 96(3):

> No sum shall be payable by an insurer under subsection (1) if before *the date the liability was incurred*, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.
>
> (Emphasis added)

16 The above phrase has been the subject of judicial consideration in a number of cases. It appears that there are two lines of decisions on the construction to be given to this phrase. One adopting the position that the declaration must be obtained by the insurance company before the accident involving the insured vehicle, and the other taking the position that it must be obtained before judgment.

17 In *Kurnia Insurans (Malaysia) Bhd v Kein Hing Appliances Sdn Bhd* (Shah Alam High Court OS 24-2979-12/2011), the High Court adopted the latter view and granted an application under s 96(3), notwithstanding the fact that it was made after the accident. The court rejected the contention that s 91(1)(b) demonstrated that the view that the application can be made at any time before judgment was

erroneous. Hadhariah bt Syed Ismail J explained:

> Di bawah s 96(3) Akta Pengangkutan Jalan 1987, penanggung insurans boleh memohon deklarasi membatalkan polisi sebelum 'liability was incurred'. Peguamcara responden kedua berhujah bahawa perkataan 'before the sate the liability was incurred' bermaksud pada masa kemalangan dan bukannya sebelum penghakiman diberikan. Saya dimaklumkan oleh peguamcara pemohon bahawa pemohon berada dalam keadaan 'catch 22' kerana jika deklarasi tidak dipohon sebelum penghakiman diberikan, mereka akan kehilangan hak untuk membatalkan polisi insuran itu kemudiannya. Saya berpendapat perkataan 'before the date the liability was incurred' itu bermaksud sebelum penghakiman diberikan. Pendapat saya itu berasaskan fakta bahawa tidak siapa yang tahu bila kemalangan akan berlaku. Adalah mustahil untuk penanggung insurans boleh mengesahkan polisi insurans sah pada hari kemalangan berlaku kerana siasatan perlu dibuat terlebih dahulu.

18 The decision was affirmed by the Court of Appeal on 1 August 2013. It is imperative to note that the interveners repeat before me the same arguments that were unsuccessfully advanced in the Court of Appeal. The decision of the Court of Appeal constitutes a precedent by which this court is bound and concludes the issue here in favour of the plaintiffs. In the result, the application is not out of time and the plaintiffs are entitled to the declaration they seek as the Bangi action is still pending.

BRIEF FACTS

[46] The respondent had issued a motor policy to the vehicle owner, Imtinan Muhamad Sultan who is said to have sold the vehicle to Abdul Razak bin Yakop. However, the vehicle was not registered in the road transport department due to some technicalities.

[47] Abdul Razak's son, Danial, while driving the vehicle collided with a motorcycle and injured two persons who are the interveners as well as the appellants in this appeal.

[48] The interveners had initiated a suit in negligence against Danial as the driver and Imtinan as the motor vehicle owner. The respondent had appointed lawyers to defend Imtinan and also had filed defence. Subsequently, realising that Imtinan had sold the motor vehicle, the insurer had filed the originating summons to avoid liability under the insurance policy.

CONSTRUCTION AND JURISPRUDENCE IN RELATION TO SECTION 96(3) OF THE RTA 1987

[49] It is a mandatory requirement for a motor vehicle owner to obtain an insurance policy to cover third party risks (see s 90 of the RTA 1987). The insurance coverage technically is not for the motor vehicle owner per se, but to

cover negligence caused by the use of the motor vehicle by any person (see s 91(b) of the RTA 1987). That is to say, any person can drive the motor vehicle whether authorised by the owner or otherwise, but if the vehicle causes damage to third party, the insurers are liable to pay under the policy unless the insurance policy and/or the certificate stated in s 91(4) of the RTA 1987 is set aside by the order of court (see s 91 of the RTA 1987).

[50] Under s 96(1), if judgment has been made against the motor vehicle owner, the law requires the insurer to pay to the third party who holds the judgment, notwithstanding the insurer could have avoided or cancelled the policy. The exceptions are spelt out in sub-ss 96(2) and (3) of the RTA 1987. The said section reads as follows:

> (1) If, after a certificate of insurance has been delivered under sub section 91(4) to the person by whom a policy has been effected, judgement in respect of any such *liability* as is required to be covered by a policy under paragraph 91(1)(b) (being a *liability* covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the *liability*, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.
>
> 2. No sum shall be payable by an insurer under subsection (1)-
>
> (a) in respect of any judgement, unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings;
>
> (b) in respect of any judgement, so long as execution thereon is stayed pending an appeal; or
>
> (c) in connection with any *liability*, if before the happening of the event which was the cause of the death or bodily injury giving rise to the *liability* the policy was cancelled by mutual consent or by virtue of any provision contained therein and either-
>
> (i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;
>
> (ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or
>
> (iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced

proceedings under this Part in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

[51] It is trite that the declaratory relief are discretionary relief. If the court finds it will be unjust on the facts and circumstances to grant the declaration it may refuse the declaration. There must be material before the court to refuse the declaration.

[52] I have read the appeal records and the able submission of the learned counsel. After much consideration to the submission of the respondent, I take the view that the appeal must be dismissed. My reasons, inter alia, are as follows:

(a) I agree with the respondent (insurer)'s submission that a declaration can be obtained before the judgment in the negligence suit. However, the court can refuse the declaration if the interveners can demonstrate prejudice in consequence of the delay by the respondent approaching the court for the relief, taking into consideration that the relevant provision has the characteristic of social legislation; and

(b) we have perused the affidavit of the interveners. The affidavit does not demonstrate any fact relevant to the question of prejudice or that it will be unjust to grant a declaration at this stage, save that the deponent only complains of delay and not prejudice to sustain third party claim in consequence of delay which cannot be compensated by costs by the insurer in respect of the delay.

[53] For reasons stated above, the appeal is dismissed with no order as to costs.

We hereby order so.

Prasad Abraham JCA

[54] This appeal was heard on 22 January 2015 and we adjourned the matter for decision to a date to be fixed as we were of the view that the appeal raised an important question of law that required our further deliberation. I now deliver my judgment. The facts material to this appeal are now set out below.

FACTS GERMAINE TO THIS APPEAL

[55] The facts in the present case are not in dispute. The defendant, Imtinan Muhamad Sultan, was the registered owner of the motorcar and had applied for insurance cover for the motorcar from the respondents for the period 6 November 2012 to 5 November 2013.

[56] The motorcar was involved in an accident on 22 January 2013 with motorcycle bearing registration No WUT 8370 which was being ridden by Ahmad Nadzrin bin Abd Halim ('the rider') with Muhammad Aiman bin Abd Rahman as his pillion ('interveners'). The registered owner of the motorcycle was Abd Rahman bin Sudin. At the time of accident, the motorcar was not driven by the defendant, but one Danial Iskandar bin Abdul Razak ('Danial').

[57] Messrs Raj & Co then instituted a civil suit at the Bandar Baru Bangi Sessions Court ('the Bangi action') on behalf of the rider and his pillion against Danial and the defendant to claim for damages for injuries and losses suffered as a result of the accident. The summons and statement of claim averred that Danial was the driver of the motorcar and the defendant was the owner.

[58] Following the receipt of the summons and the statement of claim, the respondent appointed adjusters to investigate the claim and engaged solicitors to represent the defendant in the Bangi action. The adjusters obtained copies of the police reports made by Danial, the rider, his pillion and Danial's father, Abdul Razak bin Yaacob in respect of the accident.

[59] The respondent then discovered that the defendant had sold the motorcar to Danial's father prior to the accident. This information had come from Danial's father who had in his possession the relevant supporting documents to corroborate his statement that he had become the new owner at the material time. According to Danial's father, he had taken the forms executed by the defendant to effect the name change but was unable to do so because the road transport department had made a mistake in the spelling of the defendant's name in their records. It did not tally with the defendant's name as spelt in his Indonesian passport. Danial's father also informed the plaintiffs

that the defendant could not be reached thereafter to rectify the mistake in the records of the road transport department and has remained the registered owner.

[60] Danial's father gave a statutory declaration confirming his purchase of the motorcar from the defendant prior to the accident.

[61] On 8 May 2014, the respondent filed the present application to cancel the policy. The application was supported by two affidavits affirmed by Wong Chee Yein and Ratnadevi d/o Irusan. It was averred that the defendant had failed to disclose the sale of the motorcar and this omission entitled the plaintiff to avoid the policy. It was explained that the respondents had mistakenly engaged solicitors to represent the defendant in the Bangi action not knowing that the defendant had no insurable interest in the motorcar at the time of accident, but discharged themselves upon confirming that the latter had sold the motorcar.

[62] The rider and his pillion ('the interveners') applied to intervene in these proceedings and on 2 July 2014 were given leave to do so.

FINDINGS

[63] To decide this question, reference should be made to s 96(3) of the Road Transport Act 1987 ('the said Act') and in particular s 96(1) of the said Act which sets out the purport of the scheme for persons insured in respect of third party risks. And I set out s 96(1) in toto:

> Duty of Insurers to justify judgments against persons insured in respect of third party risk
>
> (1) If, after a certificate of insurance has been delivered under sub section 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.(Emphasis added.)

[64] In our particular case the respondent had made an application to the High Court to seek a declaration under s 96(1) of the said Act that the insurance policy issued by them was void and/or unenforceable. The grounds for that application was that they had been a change in the ownership of the

insured vehicle without due notice being given to the applicant (a fact not in dispute). A

[65] The appellants in this case do not seriously challenge the right of the respondent to do so. But the argument that they mount before this court is that the respondent is precluded from doing so as the respondent had failed to seek such a declaration before the date of the accident. B

[66] This would require and interpretation of s 96(3) of the said Act and in particular the words 'if before the date the liability was incurred'. For purposes of gravity, the whole of s 96(3) is set out below: C

> Duty of Insurers to justify judgments against persons insured in respect of third party risk
>
> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable: D
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.(Emphasis added.) E

F

[67] I have examined the authorities on this sub-s which appeared to be divergent ie a group of cases holding that such a declaration must be made before the date of the accident, and the other view ie such an application to be made before judgment is entered, a view take by a learned judge in this present appeal. G

[68] Having perused all the cases, it is my considered view that the words that I referred to earlier must mean that the respondent is entitled to obtain a declaration from court that its policy was void and/or unenforceable before judgment was entered against the respondent which in our view is when liability will be incurred by the respondent. If s 96(1) of the said Act is looked at, particularly the words 'judgement in respect of any such liability as is required to be covered by a policy under para 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy' supports that proposition. In our present case the learned judge followed *Kurnia Insurans (Malaysia) Bhd v Kein Hing Appliances Sdn Bhd* (Shah Alam High Court OS 24-2979-12/2011) and the judgment of the Ladyship Hadhariah J whose reasoning I agree. This particular case went on appeal to this court and the judgment was upheld. Hadhariah J explained: H I

Di bawah s 96(3) Akta Pengangkutan Jalan 1987, penanggung insurans boleh memohon deklarasi membtalkan polisi sebelum 'liability was incurred'. Peguamcara responden kedua berhujah bahawa perkataan 'before the date the liability was incurred' bermaksud pada masa kemalangan dan bukannya sebelum penghakiman diberikan. Saya dimaklumkan oleh peguamcara pemohon bahawa pemohon berada dalam keadaan 'catch 22' kerana jika deklarasi tidak dipohon sebelum penghakiman diberikan, mereka akan kehilangan hak untuk membatalkan polisi insuran itu kemudiannya. Saya berpendapat perkataan 'before the date the liability was incurred' itu bermaksud sebelum penghakiman diberikan. Pendapat saya itu berasaskan fakta bahawa tidak siapa yang tahu bila kemalangan akan berlaku. Adalah mustahil untuk penanggung insurans boleh mengesahkan polisi insurans sah pada hari kemalangan berlaku kerana siasatan perlu dibuat terlebih dahulu.

[69] I am also in agreement by the views express by His Lordship Justice Vazeer in the case of *Pacific & Orient Insurance Co Berhad v Goh Cheng Loong & 2 ors* [2013] 1 LNS 1002 an unreported decision and to the judgment at pp 11–12 and I quote:

[16] A careful reading of s 96(3) of the Road Transport Act 1987 shows that the insurer can repudiate liability only if, before liability was incurred, the insurer has obtained a declaration from the court to the effect that the policy of insurance is void or unenforceable. Here, the statutory liability for the plaintiff to pay would arise from the operation of s 96(1) of the Road Transport Act 1987 which reads:

If, after a certificate of insurance has been delivered under sub-s 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[17] Therefore, it is abundantly clear that the insurer's statutory liability to pay would come about when judgment in respect of any such liability as is required to be covered by a policy under para 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy and the requisite notice under s 96(2) of the Road Transport Act 1987 has been given by the claimant, provided that the other provisos in s 96(2) did not apply. Once that liability has arisen the insurer cannot avail itself of the provisions of s 96(3) of the Road Transport Act 1987 to seek declaratory relief to repudiate liability. In this case, that judgment on liability pursuant to s 96(3) would be the judgment of the sessions court in the sessions suit, which has been delivered. Therefore, the liability in respect of the policy issued to the first defendant has arisen and incurred by the plaintiff and any declaration issued by this court subsequent thereto pursuant to s 96(3) of the Road Transport Act 1987 would be redundant and would be of no use to the plaintiff to avoid liability. In this regard, I agree with submissions of counsel for the

third defendant that, this application is an abuse of the court's process. A

Again the reasoning with which I agree with.

[70] Another instructive case in my view which sheds light on this question of interpretation of this words is the case of *QBE Insurance Ltd v Hashim bin Abdul & Anor* [1981] 2 MLJ 275 and to the judgment of Syed Agil Barakbah J (as he then was). Before I proceed to deal with this case I wish to place a rider that the case deals with the precursor to the current said Act ie Road Traffic Ordinance 1958. But we are of the view that the principle of interpretation remains the same. It was held by Justice Syed Agil Barakbah (as he then was) that liability is incurred only when judgment in respect of liability as covered by the terms of the said insurance policy is given against the insured and we quote from the judgment at p 276: B C

> The law as to the insurers' statutory obligation towards third parties is set out in para 769 on p 375 of 22 *Halsbury's Laws of England* (3rd Ed) as follows: — D
>
> > *The first condition of the obligation of the insurers is that there is a judgment. The second condition is that the judgment must be in respect of a liability which is required to be covered by compulsory insurance. In other words the only person who can maintain a right of action direct against the insurers is a person falling within a limited class of third parties whose bodily injury or death is required to be covered by a motor policy. The third condition is that the liability is in fact covered by the terms of the policy or would be covered by the policy but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy.* E
>
> The above deals with s 10(1) of the English Road Traffic Act, 1934 which is in pari materia to our sub-s (1) to s 80. F
>
> It is clear from his grounds that in construing subsection (1) of s 80 the magistrate failed to direct his mind that the statutory liability of the insurance company to pay any claim made against the insured ie the second defendant commences when judgment in respect of such liability as is covered by the terms of the policy is given against the insured. *Such judgment being a condition precedent, no liability can be attached to or imposed upon the insurers until and unless judgment has been obtained.* G
>
> Secondly the reason for the application of a third party notice is because the insurance company intended to avoid liability for any damages arising out of the accident as stated earlier. The learned magistrate feared that if the insurers were not brought in as third party, they would be absolved from liability to indemnify the injured party and in the circumstances he was of the opinion that the whole effect of s 80(1) would be defeated. H
>
> The effect of the section is sufficiently considered by HT Ong CJ (as he then was) in *New Zealand Insurance Co Ltd v Sirnwdora* with which I agree with respect. On p 184 his Lordship says: I
>
> > The marginal note describes it as the 'duty of insurers to satisfy judgments against persons insured in respect of third party risks'. This duty is, of

A course a liability to indemnify the policy holder (including whomsoever may be insured by the policy) against judgments obtained by a third party. The third party is in fact in a better position than the insured himself because it is declared that 'notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the claim of the third party nevertheless prevails.

B

The insured's right to be indemnified is naturally a valuable chose in action ... (Emphasis added.)

C **[71]** The liability of the defendant (insured) only arises when judgment is obtained against the defendant (insured). In the case cited s 80(1) of the Road Traffic Act is similar in terms to the said Act. How can it be said that liability arises immediately upon issuance of a policy when the purpose of the same was to cover a third party claim against the defendant (insured) when and only when judgment is entered against the defendant (insured). So it follows as alluded to in the cases cited, that obtaining of the judgment is a condition precedent to liability and therefore the words should be interpreted to read that the respondent was entitled to make the application to declare the insurance policy void and unenforceable before judgment was entered against the defendant (insured).

D

E

[72] I also find that the respondent had complied with s 96 (3) of the said Act and the proviso to the same. In the light of that, the appeal of the appellants in this appeal is dismissed with no order to costs.

F

Appeal dismissed with no order as to costs.

Reported by Ashok Kumar

G

H

I